

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

TYRONE PATRUNO,
Appellant

v.

D1-16-128

CITY OF CHICOPEE,
Respondent

Appearance for Appellant:

Douglas A. Hall
NAGE / IBPO / IAEP
346 Main Street
Cromwell, CT 06416

Appearance for Respondent:

Thomas J. Rooke, Esq.
Chicopee Law Department
City of Chicopee
17 Springfield Street
Chicopee, MA 01013

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

1. On July 28, 2016, the Appellant, Tyrone Patruno (Mr. Patruno), filed an appeal with the Civil Service Commission (Commission).
2. On September 14, 2016, I held a pre-hearing conference at the Springfield State Building which was attended by Mr. Patruno, his representative and counsel for the City of Chicopee (City).
3. At the pre-hearing conference, counsel for Mr. Patruno stated that: a) on December 19, 2015, Mr. Patruno, a permanent, tenured police officer in the City's Police Department, verbally requested an unpaid leave from the City's Police Chief; b) the City's Police Chief verbally granted the unpaid leave; c) on January 15, 2016, Mr. Patruno made a verbal request to the Police Chief to return to work; and d) the Police Chief verbally told Mr. Patruno that his request was denied, and that Mr. Patruno could not be reinstated until he passed a fitness for duty evaluation.

4. Also at the pre-hearing, counsel for the City stated that, at the time that Mr. Patruno made the verbal request for leave, his conduct was under investigation in regard to actions / inactions surrounding the death of his girlfriend.
5. Both parties agreed that multiple psychological evaluations have occurred over the past several months, with conflicting results and, that since December 19, 2015, Mr. Patruno has remained on unpaid leave.
6. As a preliminary matter, I raised the issue of whether the Commission had jurisdiction to hear this appeal, as it appeared to fall squarely under G.L. c. 31, s. 37 which states, in relevant part:

“Section 37. An appointing authority may grant a permanent employee a leave of absence or an extension of a leave of absence; provided that any grant for a period longer than fourteen days shall be given only upon written request filed with the appointing authority by such person, or by another authorized to request such leave on his behalf, and shall be in writing. The written request shall include a detailed statement of the reason for the requested leave and, if the absence is caused by illness, shall be accompanied by substantiating proof of such illness. A copy of the written grant shall be kept on file by the appointing authority, who shall, upon request, forward a copy thereof to the commission or administrator. No leave of absence for a period longer than three months, except one granted because of illness as evidenced by the certificate of a physician approved by the administrator, shall be granted pursuant to this paragraph without the prior approval of the administrator.

...

Any person who has been granted a leave of absence or an extension thereof pursuant to this section shall be reinstated at the end of the period for which the leave was granted and may be reinstated earlier. **If the appointing authority, upon demand of such person, shall fail to reinstate him to his civil service position, such person may request a hearing before the administrator. The administrator shall proceed forthwith to hold such a hearing and to render his decision.** (**emphasis added**)

If a person shall fail to return to his civil service position at or before completion of the period for which a leave of absence has been granted under any provision of this section, the appointing authority shall, within fourteen days after the completion of such period, give such person a written notice setting forth the pertinent facts of the case and informing him that his employment in such position is considered to be terminated, whereupon the employment of such person in such position shall terminate. The appointing authority shall file with the administrator a copy of such notice which shall state the date on which the employment of such person should be recorded as having terminated. **The provisions of sections forty-one through forty-five shall not apply to a termination made under this paragraph.** Nothing in this section shall be deemed to prevent the subsequent reinstatement of such person pursuant to section forty-six.” (**emphasis added**)

7. Similar language, regarding the right of appeal *to the administrator* (HRD), is contained in G.L. c. 31, s. 38
8. In a case regarding a termination under Section 38, which also references Section 37, the Appeals Court in Sisca & another v. City of Fall River and others, 65 Mass.App.Ct. 266 (2005), reinforces that appeals regarding leaves of absence are to be filed with HRD, and not the Commission.
9. However, in O'Connor v. Civ. Serv. Comm'n & another, 38 Mass.App.Ct. 979 (1995), the Appeals Court decided a case involving a Commission decision regarding Section 37 and whether a grant of leave under Section 37 must be *in writing*.
10. In light of O'Connor, I was not inclined, at that time, to dismiss the appeal for lack of jurisdiction without first allowing the parties to submit written briefs and make oral argument.
11. Rather, I ordered the following:

The parties had thirty (30) days to reach a mutual agreement to resolve this matter.

In the event that the parties did not reach a mutual agreement that resulted in the withdrawal of this appeal, a status conference would be held on Wednesday, October 26, 2016 at 9:00 A.M. at the Springfield State Building in Springfield at which time a briefing schedule would be established regarding the issue of jurisdiction.
12. On October 26, 2016, I held a status conference, which was attended by the same individuals who attended the pre-hearing conference.
13. At the status conference, the parties reported that Mr. Patruno was scheduled for a fitness for duty evaluation on October 28th. If it was determined that Mr. Patruno was fit for duty, the City stated that Mr. Patruno would likely be returned to duty. Mr. Patruno's representative stated that, even if that occurred, Mr. Patruno was still seeking reinstatement and back pay retroactive to January 15, 2016, the date he claims he verbally requested reinstatement and the Police Chief verbally denied his request for reinstatement.
14. At the conclusion of the status conference, I established a briefing schedule allowing the City to file a Motion to Dismiss the Appellant's appeal and for the Appellant to file a reply. Those submissions were received and a motion hearing was held on January 11, 2017.
15. At the outset of the motion hearing, the City reported that the fitness for duty evaluation had been completed and that the evaluation's conclusion was that Mr. Patruno was not fit for duty. Based on that information, counsel for the City indicated that it planned on moving forward with a local civil service hearing under G.L. c. 31, s. 41. A potential outcome of that hearing could be Mr. Patruno's termination, which the City concedes could be appealed to the Civil Service Commission by Mr. Patruno.

16. In regard to the instant appeal, counsel for the City argued that the Commission does not have jurisdiction to hear this appeal, which the City argues falls squarely under Section 37 which limits any appeal by Mr. Patruno to the Administrator (HRD). Further, counsel for the City stated that the Police Chief did not allow, verbally or otherwise, a leave of absence for the Mr. Patruno.
17. Mr. Patruno's representative argued that the Commission does have jurisdiction to hear the instant appeal, reiterating the arguments contained in the brief that this appeal should be considered under G.L. c. 31, s. 41 as, according to Mr. Patruno, the Town's failure to reinstate him amounted to a suspension.

Analysis / Conclusion

Solely for the purposes of rendering a decision on the City's Motion to Dismiss, I accept as true all the statements contained in the Appellant's brief in regard to the sequence of events here, including, but not limited to, that he made a verbal request to the Police Chief on December 19, 2015 for an unpaid leave; that the Police Chief verbally allowed his request; that Mr. Patruno made a verbal request to be reinstated on January 15, 2016; and that the Police Chief verbally denied his request the same day.

Even accepting these statements as true, the instant appeal should be dismissed for the reasons discussed below.

First, notwithstanding the decision in O'Connor, I believe the plain language of Section 37 states that any appeal rights related to an Appointing Authority's purported failure to reinstate a civil service employee who has been on approved leave is limited to an appeal with the *Administrator (HRD)*, not the Commission.

Second, even if the Commission had jurisdiction to hear this appeal under Section 37, Mr. Patruno acknowledges that he never submitted a *written* request to be placed on unpaid leave, as required by Section 37. Thus, Mr. Patruno's absence from work after fourteen (14) days proceeding December 19th could be considered an unauthorized absence under Section 38. Any appeal rights related to an unauthorized absence under Section 38 are also limited to filing an appeal with HRD.

Third, even if I were to consider this an appeal of a suspension for which the Town failed to provide the Appellant with notice and/or a hearing, which the Appellant argues occurred as of January 15th, the appeal is not timely. G.L. c. 31, s. 42 states in part that:

Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. **Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements.** If the commission finds that the appointing authority has

failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.” (**emphasis added**)

While the instant appeal must be dismissed, I note that the City, as part of the motion hearing, stated that, based on the findings of the fitness for duty evaluation, planned to move forward expeditiously with a local appointing authority hearing and acknowledged that any adverse decision resulting from that hearing could be appealed to the Commission by the Appellant.

For the above reasons, Mr. Patruno’s appeal under Docket No. D1-16-128 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 2, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Douglas Hall (for Appellant)

Thomas J. Rooke, Esq. (for Respondent)